United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1370

To be argued by
HUGH W. CUTHBERTSON

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1370

UNITED STATES OF AMERICA,
Appellee,

—v.—

DAVID LEE WHITE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

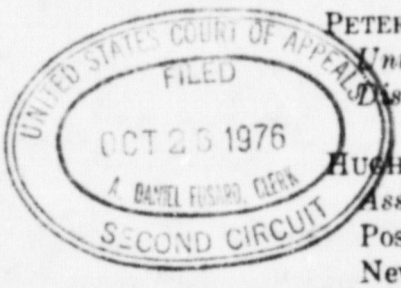

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TABLE OF CASES

United States Court of Appeals

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UNITED STATES OF AMERICA,

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—v.—

DAVID LEE WHITE,

Appellant.

BRIEF FOR THE APPELLEE

Issues Presented

I. Whether the trial court erred in failing specifically to instruct the jury on eyewitness identification, where identification of the defendant was not a key issue.

II. Whether the trial court properly instructed the jury on the defense of coercion.

III. Whether the trial court properly examined the defendant and instructed the jury on the credibility of the defendant as a witness?

Statement of the Case

This is an appeal from a judgment of conviction in the United States District Court for the District of Connecticut (Murphy, *J.*), on July 15, 1976, after a jury verdict of guilty on June 11, 1976.

On December 2, 1975, a Grand Jury sitting in New Haven, Connecticut, returned a one count indictment (Criminal No. N-75-174) charging the appellant, David Lee White, with having escaped from the Federal Correctional Institution (F.C.I.), Danbury, Connecticut, on September 26, 1975, in violation of Title 18, United States Code, Section 751(a). On February 10, 1976, counsel was appointed and White entered a plea of not guilty. On May 5, 1976, the Grand Jury returned a superseding one count indictment charging White with the same offense. On May 24, 1976, White entered a plea of not guilty to the superseding indictment and a jury was empaneled the same day.

On June 10, 1976, trial commenced before Judge Murphy and on June 11, 1976, the jury returned a verdict of guilty to the indictment. White was sentenced on July 15, 1976, to two years with a recommendation that he be committed to the Federal Correctional Institution, Springfield, Missouri. White is currently serving this sentence.

Notice of Appeal to this Court was filed on July 15, 1976.

Statement of Facts

On the evening of September 26, 1975, three inmates escaped from the F.C.I. in Danbury, Connecticut. A search of the institution revealed that the three inmates were David Lee White, James Carroll and Kent Frey. Following a cross-country escape route, White was apprehended on October 1, 1975, in Frisco, Colorado.[1]

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[1] Carroll had previously been caught in Indianapolis, Indiana on September 29, 1975, while Frey was not arrested until October 18, 1975 in Los Angeles, California.

At trial, the Government established that on October 5, 1973, White had been lawfully committed to the custody of the Attorney General pursuant to a judgment of conviction of the United States District Court for the Western District of Pennsylvania. The Government also demonstrated that on September 26, 1975, White was confined at the F.C.I. in Danbury, Connecticut, by virtue of this conviction and pursuant to the direction of the Attorney General.

Neil C. Aiello, administrative assistant at the F.C.I., testified that on September 26, 1975, White had no official authority to be absent from the institution. John C. McCarthy, chief correctional supervisor, testified that he directed a search of the institution that night, once the escape had come to light, and discovered that the three inmates had left through a ground floor window, which they had forced open.

Robert E. Simmons, a former police officer in Frisco, Colorado, testified that on October 1, 1975, at approximately 6:00 p.m., while on routine patrol he observed White walking along Colorado state highway 9, heading out of town and in the direction of interstate highway 70.[2] (Tr. 47). Simmons testified that he turned his patrol car around, stopped, got out of the car and motioned White toward him. (Tr. 48). Simmons testified that after he asked White whether he lived in Frisco and for some identification, White admitted that he was an escaped federal prison. (Tr. 48). Simmons testified that after he had placed White under arrest and had advised him

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[2] Prior to receiving the testimony of Simmons, the court held a hearing at White's request pursuant to 18 U.S.C. § 3501 out of the presence of the jury to determine the voluntariness of any statements made by White to Simmons. The court found that White's statements were voluntary. (Tr. 46).

of his constitutional rights, White explained that he and two other idividuals had escaped from a federal penitentiary in Connecticut and had driven a stolen car to Georgia and then to Kentucky where they left one of the escaped inmates. (Tr. 49). Simmons testified that White told him that they left this inmate because he was making too many contacts with relatives which he had in the area. (Tr. 49-50). Simmons testified that White said he and the other inmate then proceeded through Nebraska, where they ditched the stolen car which they had been driving, and took a bus to Denver, Colorado. (Tr. 50). Simmons testified that White said that he parted company from this other inmate in Denver and hitched a ride to Frisco. (Tr. 50). Simmons testified finally that White told him that at the time of their meeting on Colorado highway 9 he was heading to Nevada to visit his brother. (Tr. 50).

David L. Norton, special agent of the Federal Bureau of Investigation (F.B.I.), testified that on October 2, 1975 he and special agent Kenneth Parkerson of the F.B.I. interviewed White in Denver, Colorado. (Tr. 57, 60). Norton testified that after White was advised of his constitutional rights he admitted that he had escaped with two others from the F.C.I. in Danbury and had travelled in a stolen car to Georgia and then Kentucky. (Tr. 58). Norton testified that White said that Carroll was the individual whom they left in Kentucky. (Tr. 58). Norton testified that White stated that he and Frey continued west through Indiana until they arrived in Nebraska, where they abandoned the stolen car and took a bus to Denver. (Tr. 59). Norton testified that White told them that the reason for his escape was that he was being considered for parole and placement in a halfway house, but that the halfway house had turned him down. (Tr. 59).

White testified in his own defense and admitted escaping with Carroll and Frey from the F.C.I. but asserted the defense of coercion. White testified that he had informed the authorities at the F.C.I. that Carroll and Frey were planning an escape and that a number of people on the prison staff knew that he had been giving such information. White testified that on the evening of September 26, 1975, Carroll and Frey forced him at knifepoint to escape with them.[3] Whtie testified essentially that he was their captive throughout the ensuing cross-country journey.[4] This journey consisted of a drive south to Georgia, where Carroll had relatives and where, White testified, they burglarized a house, obtaining a 12 gauge shotgun. White testified that they thereafter drove north to Indianapolis, where he and Frey left Carroll.

White testified that he and Frey then drove west from Indianapolis through Missouri and Kansas to North Platte, Nebraska, whert they abandoned the car. White said that he bought bus tickets in North Platte to Denver for Frey and himself and they arrived in Denver early on the morning of October 1, 1975. (Tr. 78). Whtie

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[3] The defense theory apparently was that word of White's informing had gotten back to Carroll and Frey who thereupon forced White to leave with them. See Tr. 212 (defendant's closing argument). Although McCarthy had testified earlier that White had informed himself and a lieutenant at the prison that Carroll and Frey were planning an escape and that he had, therefore, put certain staff members on alert, he also testified that he did not tell those staff members that White was the source of the information. (Tr. 26-27, 29). McCarthy testified, moreover, that White was not the only inmate who had provided information regarding Carroll and Frey's planned escape. (Tr. 35).

[4] In this regard, White testified that he is six feet seven inches tall, whereas Frey, whom the defense characterized at trial (Tr. 215) and now on appeal (Appellant's Brief, at 4, 16) as the captor capable of violence, is only about six feet tall. (Tr. 109).

testified that he was able to elude Frey, who still carried the shotgun, at approximately 9:30 a.m. that day by getting mixed up in a crowd of Denver shoppers. (Tr. 79-80).

White testified that he then hitchhiked a ride to Frisco, Colorado, arriving there at approximately 3:00 p.m. (Tr. 80).[5] White testified that he walked around the country for the rest of the afternoon and finally turned himself in to Simmons, whom he saw parked on the side of Colorado highway 9, at approximately 6:00 p.m.

On cross-examination, White admitted that he had discussed the escape with Frey on several occasions at least ten days prior to the actual escape. (Tr. 88). During these discussions, White admitted, he had advised against escaping over the institution's back fence, the escape route which Frey had initially proposed, and suggested that a better route would be through a ground floor window in the institution's educational complex, the route eventually taken. (Tr. 87-90).[6]

White testified that on the initial leg of the journey from Danbury to Georgia, during which time the only weapon which either Carroll or Frey possessed was a knife, they stopped for ten or fifteen minutes in a gas station off the turnpike in New York to have windshield wipers installed on the car they had stolen. (Tr. 94-95). Although White admitted that he had occision to get out when they stopped and that a police car had pulled into

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[5] Simmons had previously testified that Frisco is approximately 70 to 75 miles from Denver via interstate highway 70. (Tr. 50).

[6] White had informed the prison authorities that the escape would be over the rear fence during the noontime period. (Tr. 27, 36, 65).

the station while they were there, he made no attempt to notify the officer or anyone else of his predicament and made no attempt himself to get away from Frey and Carroll. (Tr. 95). White further admitted that on at least two other occasions before they reached Indianapolis he failed to make any attempt to escape at times when he was alone with Frey. (Tr. 96-99).

White testified that once they arrived in Indianapolis, he and Frey left Carroll because he was attempting to contact too many friends. (Tr. 100). White testified that he and Frey then drove west through Illinois, where they committed a burglary. (Tr. 102). On this occasion, White admitted, he willingly entered the house and helped look for money. (Tr. 102-103). Although White and Frey split up and searched the house separately, White admitted that he again made no attempt to get away. (Tr. 103-104).

White testified that he finally eluded Frey in Denver on October 1, 1975, at approximately 9:30 a.m. He admitted, however, that he did not at that time look for a police officer or anyone else in Denver to whom he could surrender. (Tr. 110). Instead, White testified, he hitched a ride which eventually brought him to Frisco, Colorado, at approximately 3:00 p.m. White admitted that he did not inform the motorist who gave him the ride of what had happened to him or ask him to turn him over to the authorities. (Tr. 110-111).

White admitted that when he and Simmons met that evening, he was walking away from Frisco in the direction of interstate highway 70. (Tr. 111-112). White further admitted that he told Simmons that at the time of their meeting he was thinking of going to Nevada to visit his brother. (Tr. 112). White testified that he did not tell Simmons that he had been forced by other prisoners to leave the institution in Danbury. (Tr. 112).

White also admitted that when he was interviewed by special agents of the F.B.I. in Denver, he did not tell them that he was forced into escaping. (Tr. 112). Although White testified that he could not remember whether he told the interviewing agents that the reason for his escape was the denial of his parole to a halfway house, he did admit that it had been suggested that he be placed in a halfway house and that such placement was not effected because he was not from the area. (Tr. 112-114).

In rebuttal, the Government presented the testimony of Rita Gonzalez, a former department store saleswoman from Minneapolis, Kansas, who testified that on September 30, 1975, she sold White and another smaller man some shirts and socks.[7] Gonzalez testified that both men were in the store for approximately fifteen minutes. During that time White, who was courteous and pleasant, browsed at the counter at the front of the store while the smaller man was in the rear of the store. (Tr. 162). Gonzalez testified that both men laughed and White paid for all of the purchases. (Tr. 163-164).

Frey and Carroll both testified in rebuttal and denied coercing White into escaping. (Tr. 180, 193). In addition, Frey testified that he did not know that White had been informing the prison staff about the proposed escape. (Tr. 173).

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[7] At White's request, the court held a hearing out of the presence of the jury to determine whether a spread of photographs which the F.B.I. had shown to Gonzalez on December 1, 1975, and from which Gonzalez identified White as one of the individuals to whom she sold merchandise on September 30, 1975, was impermissibly suggestive. The court found that the photographs were not suggestive and that in any event Gonzalez had an independent basis for her identification of White. (Tr. 157).

The court granted White's request for an instruction on the defense of coercion as well as the Government's request that the failure to return to custody be included in the definition of escape. The court denied White's request for an instruction on identification from photographs and declined to charge the jury on eyewitness testimony in the language proposed by White. (Tr. 201-202).

The jury deliberated for approximately three hours and returned a verdict of guilty.

ARGUMENT

I.

The court below did not err in failing specifically to instruct the jury on eyewitness identification, because the identification of White was not a key issue.

The trial court properly instructed the jury on the credibility of witnesses and did not abuse its discretion by failing to include a specific charge on eyewitness identification. While this court has suggested the use in some cases of a cautionary charge on eyewitnesses identification, *see, e.g., United States* v. *Fernandez*, 456 F.2d 638, 643-44 (2d Cir. 1972), it has pointed out that those cases are only where the identification of the defendant is a key issue. *United States* v. *Evans*, 484 F.2d 1178, 1187 (2d Cir. 1973).[8] This is not such a case. White's willing

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[8] Both *Fernandez* and *Evans* involved bank robberies, cases in which eyewitness identification is almost always a crucial issue. *United States* v. *Gentile*, 530 F.2d 461 (2d Cir. 1976), upon which White relies, involved a securities conspiracy in which an eyewitness provided testimony that linked the defendant to a specific fraudulent transaction. There, as here, other witnesses provided incriminating evidence and the court found that failure to give the

[Footnote continued on following page]

participation in the escape and voluntary decision to remain at large [9] were, we submit, well established not only by the testimony elicited during the Government's case-in-chief but by White's own testimony as well. The identification of White was simply never in issue. White's contention (Appellant's Brief, at 6, 10, 12) that Gonzalez's rebuttal testimony [10] made identification a crucial issue in the case finds no support in the record; it overstates the importance of her testimony and ignores the substantial amount of probative testimony which preceded her.

For example, Simmons testified that when he arrested White, White was heading away from Frisco toward the

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requested instruction on eyewitness identification did not require reversal. 530 F.2d at 469.

The cases cited by White from other circuits are not to the contrary. Thus, *United States* v. *Holley*, 502 F.2d 273 (4th Cir. 1974), involved a bank robbery where the eyewitness identification of the defendant was a primary issue. *United States* v. *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), concerned a robbery where there was a single eyewitness. In *United States* v. *Hodges*, 515 F.2d 650, 653 (7th Cir. 1975), the court considered the issue of identification to be "paramount". And, *United States* v. *Barber*, 442 F.2d 517 (3d Cir. 1971), was cited by this court in *Evans*, *supra*, 484 F.2d at 1187, when it noted that there is "authority which holds that it is necessary neither to instruct the jury that they should receive certain identification testimony with caution, nor to suggest to them the inherent unreliability of certain eye-witness identification."

[9] The trial court correctly charged (App. 16-17) that even if the jury found that White initially had been forced to escape by Fred and Carroll, it could still return a verdict of guilty if it determined that White on his own volition decided thereafter to remain at large. *United States* v. *Chapman*, 455 F.2d 746, 749 (5th Cir. 1972).

[10] Although White asserts (Appellant's Brief, at 7-8) that the reliability of Gonzalez's testimony was dubious, he makes no claim on appeal that the trial court erred in receiving it.

interstate highway. (Tr. 47). White admitted that this was the direction in which he was walking. (Tr. 111-112). Simmons testified that White told him that he was then on his way to visit his brother in Nevada. (Tr. 50). White would admit that he told Simmons that he was then *thinking* of going to visit his brother. (Tr. 112). Simmons testified that White told him that he and Frey left Carroll because he was attempting to contact too many people. (Tr. 49-50). White admitted that this was in fact the reason why Carroll was left in Indianapolis. (Tr. 100).

Special agent Norton testified that White admitted to him that he had escaped from the F.C.I. in Danbury because he had not been successful in obtaining placement in a local halfway house. (Tr. 59). Although White claimed that he could not remember whether he had told this to the F.B.I., he did concede that the subject of placement in a halfway house had been mentioned to him, that he subsequently was not placed there because he was not from the area, and that he was upset over this. (Tr. 112-114).

On cross-examination White further admitted that he had counseled Frey at least ten days in advance of the escape regarding the feasibility of the particular escape route planned. (Tr. 87-90). White admitted that once out of the institution he made no attempt to escape from Frey or Carroll and surrender himself to the authorities on several occasions when he had excellent opportunities to do so. (Tr. 94-99, 102-104). White testified, moreover, that when he had finally eluded Frey in Denver, he made no attempt to turn himself in to the local police. (Tr. 110). Indeed, White admitted that he told neither the motorist who gave him a ride from Denver to Frisco, nor Simmons at the time of his arrest, nor even the F.B.I. during his interview that he had been coerced into escaping by Frey and Carroll. (Tr. 110-112).

The foregoing testimony, we submit, clearly demonstrated White's willingness to participate in the escape and to avoid capture once outside the institution. During none of this testimony was the identity of White in issue. The testimony of Gonzalez, offered in rebuttal, provided additional evidence of the lack of coercion employed against White, but it plainly did not elevate the issue of White's identity to such a degree as to require a cautionary charge on eyewitness identification.

Taken in the context of all the evidence presented at trial and the opportunity for cross-examination, it is clear that the trial judge's instruction on the credibility of witnesses (App. 23-25) was entirely adequate.[11] The court was well within the wide latitude ordinarily accorded it in choosing or declining to include within its charge on the general issue of credibility a specific instruction on eyewitness identification.

II.

The trial court properly instructed the jury on the defense of coercion.

White contends that the trial court erred by failing properly to integrate its instruction on the defense of coercion with its charge on the definition of escape. This contention is wholly without substance.

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[11] Although the trial judge refused to give White's Request to Charge No. 7, regarding identification from photographs, the court advised that, with respect to White's Request to Charge No. 6 on eyewitness testimony, it would not charge in the language requested. (App. 10-11). This was clearly proper. *See United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974), and cases cited therein. Once the court had completed its instructions to the jury, White took no exception to the way in which the latter charge had been given. See App. 28-29.

The trial court charged the jury as White requested on the defense of coercion. The actual instruction given was taken almost verbatim from White's request to charge. (Compare App. 23 and 33). The trial court also gave an instruction on the definition of escape, as the Government requested, which had been approved by the Fifth Circuit in *United States* v. *Chapman*, *supra*, 455 F.2d at 749. White does not claim on appeal that the court below erred in giving either instruction. He does claim, however, that the court did err in not properly relating the two charges.

This claim is fallacious. White did not at any time request the trial court to integrate the two instructions or propose any specific charge himself in relation thereto. Once the trial court had instructed the jury, White took no exception on this point. Clearly the trial court gave proper instructions on the defense of coercion and the definition of escape. Nothing more was required.

III.

The trial court properly examined White and instructed the jury on White's credibility as a witness.

White claims that the trial court committed prejudicial error by asking him one question during his direct examination by counsel. In addition, White contends that the court below improperly instructed the jury on his credibility as a witness. Neither claim has merit.

It is well settled that a trial judge in criminal cases has a duty to be more than a moderator or umpire and take part where necessary to clarify testimony and assist the jury in understanding the evidence. *United States* v. *Bernstein*, 533 F.2d 775, 796 (2d Cir. 1976); *United*

State v. *Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975); *United States* v. *Sclafani*, 487 F.2d 245, 256 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973); *United States* v. *Pellegrino*, 470 F.2d 1205, 1206 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973); *cf. United States* v. *Natale*, 526 F.2d 1160, 1170 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1724 (1976).

Here Judge Murphy's questioning of White [12] clarified testimony which White had given regarding the circumstances surrounding his apprehension in Frisco. None of the questions, we submit, undercut the presumption of innocence by implying any belief on the part of the court

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[12] The exchange in question is as follows (Tr. 81-82): *By Mr. Bowman*:

Q. Then what happened?

A. I come back down the highway, walked on the highway when I seen the officer.

Q. Is that Mr. Simmons who testified here today?

A. Yes.

Q. Then what happened?

A. When I seen him, he was parked beside the road talking to some other man, and I walked to his car and I identified myself, told him I escaped from the Federal Prison, gave my name and so on.

Q. And that was it?

A. (Witness nods head.)

The Court: You said you walked over to his car?

The Witness: Yes, sir. I did.

The Court: And he was talking to somebody?

The Witness: He was talking to somebody. I waited until the person he was talking to drove off.

The Court: Was the other person in uniform?

The Witness: No, sir. It was a civilian.

The Court: Did you tell your lawyer this before?

The Witness: Yes, sir. I have.

The Court: Really? So you walked over to this policeman and identified yourself?

The Witness: Yes, sir. I walked over to him myself and identified myself.

The Court: Thank you.

as to White's guilt or innocence. No objection was taken to Judge Murphy's question and, furthermore, the jury charge properly pointed out that the court's questions were solely for the purposes of clarification and expedition. (App. 26). Viewed from the perspective of the entire day's testimony, this sole exchange clearly was not such "plain error", Fed.R.Crim.P. 52(b), as to require a new trial. *United States* v. *Newman*, 481 F.2d 222, 224 (2d Cir. 1973); *United States* v. *Pellegrino*, *supra*.

White further contends that the trial court erred by instructing the jury that in judging his credibility it could consider his personal interest, as a defendant, in the outcome of the trial. The court also charged, however, that the defendant's interest in the case was not incompatible with his capability of telling the truth. (App. 25). Judge Murphy's instructions in this regard followed almost verbatim the charge which this court recently approved in *United States* v. *Martin*, 525 F.2d 703, 706 n.3 (2d Cir. 1975). This court, moreover, has consistently approved jury charges which point out the defendant's special interest in the case. *See United States* v. *Dozier*, 522 F.2d 224, 227 (2d Cir. 1975), *cert. denied*, 423 U.S. 1021 (1976); *United States* v. *Sclafani*, *supra*, 487 F.2d at 257; *United States* v. *Sullivan*, 329 F.2d 755, 756-57 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964).[13] In this case, the

[13] Contrary to White's assertion (Appellant's Brief, at 17), there is no general agreement that an instruction which points out a defendant's personal interest in the outcome of his case is less preferable than a more general instruction on credibility. White misplaces his reliance upon the decision in *United States* v. *Hill*, 470 F.2d 361 (D.C. Cir. 1972), for there the District of Columbia Circuit specifically upheld a charge based upon the Supreme Court's opinion in *Reagan* v. *United States*, 157 U.S. 301 (1895). The court held that a defendant's interest "is a very special one" and that as such it adhered "to that long line of cases which hold that it may be the subject of a specific instruction." 470 F.2d at 365. The court found Judge (now Justice) Blackmun's stated preference in *Taylor* v. *United States*, 390 F.2d 278, 285 (8th Cir.), *cert. denied*, 393 U.S. 869 (1968), for a more general instruction to be merely an "acceptable alternative, one among many." 470 F.2d at 363.

court included in its charge on the general issue of credibility the caution that the jury must determine whether *any* witness had an interest in the result of the trial or a reason for lying. (App. 24). In addition, following the instruction on the defendant's interest and credibility, the court again admonished the jury that the question of the credibility of *each* of the witnesses, including the defendant, was something for them to decide. (App. 25). This instruction was entirely proper.

CONCLUSION

For all of the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-1370

UNITED STATES of AMERICA
APPELLEE

V.

DAVID Lee WHITE

AFFIDAVIT OF SERVICE BY MAIL

ALBERT SEN SALE, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 BROOKLYN AVE BROOKLYN, NY

That on the 26TH day of OCTOBER, 1976, deponent served the within BRIEF FOR THE APPELLEE upon ANDREW R. ROWMAN, Esq. Federal Public Defender 770 CHAPEL ST, New HAVEN, CONNECTICUT 06510

Attorney(s) for the APPELLANT in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sen Sale

Sworn to before me,

This 26TH day of OCTOBER 1976

Edward A Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977